CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

STEPHEN CHARLES WIESENFELD, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE APPELLANT

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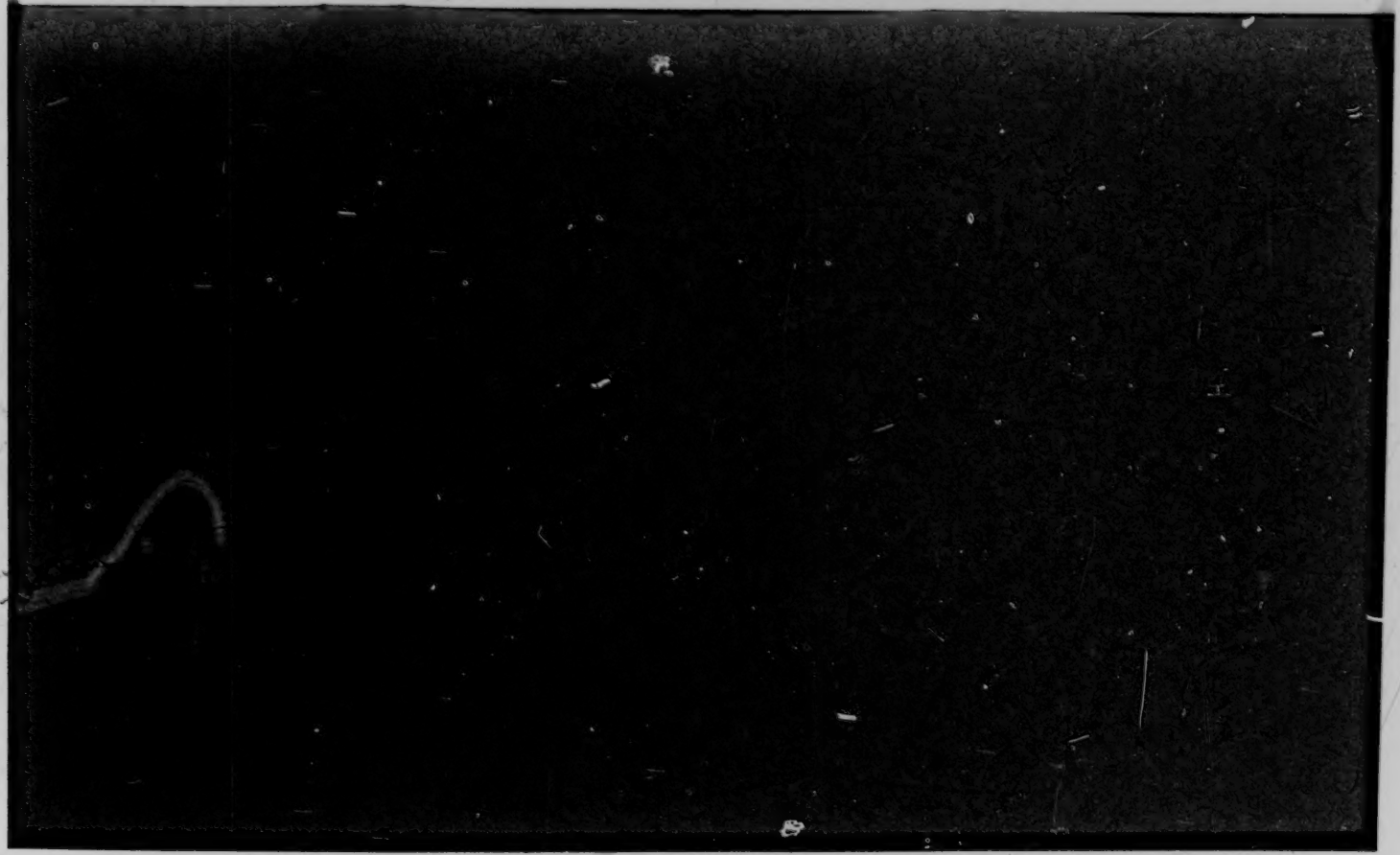

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1892

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OPINION BELOW

The opinion of the three-judge district court (J.S. App. A) is reported at 367 F. Supp. 981.

JURISDICTION

The order of the three-judge district court (J.S. App. B) declaring 42 U.S.C. 402(g) unconstitutional,

and enjoining the refusal to pay benefits thereunder to widowers, was entered on January 28, 1974. A notice of appeal to this Court (J.S. App. C) was filed on February 25, 1974. The time for docketing the appeal was extended by order of Mr. Justice Brennan to June 25, 1974. The jurisdictional statement was filed on June 18, 1974, and probable jurisdiction was noted on October 15, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether 42 U.S.C. 402(g), which provides social security benefits to widows with minor children in their care, but not to widowers with minor children in their care, denies equal protection of the laws.

STATUTE INVOLVED

42 U.S.C. 402(g) provides:

> (1) The widow and every surviving divorced mother * * * of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—
>
> (A) is not married,
>
> (B) is not entitled to a widow's insurance benefit,
>
> (C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,
>
> (D) has filed application for mother's insurance benefits, or was entitled to wife's

insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,

(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit, * * *

shall * * * be entitled to a mother's insurance benefit * * *.

(2) Such mother's insurance benefit for each month shall be equal to three-fourths of the primary insurance amount of such deceased individual.

STATEMENT

This is a direct appeal from a decision of a three-judge court invalidating, as denying equal protection of the laws, 42 U.S.C. 402(g), which provides social security benefits only to a widow with minor children in her care, based on her deceased husband's earnings record.[1] The Act does not provide for similar payments to a widower having custody of minor children.

The appellee Stephen Wiesenfeld and Paula Wiesenfeld were married from November 15, 1970, until June 5, 1972, when Paula Wiesenfeld died while giv-

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[1] The amount payable to a widow with minor children in her care is set forth in the statutory formula which affords benefits equal to three-fourths of the primary insurance amount of the deceased husband (42 U.S.C. 402(g)). Benefits payable to a widow are reduced by one dollar for every two dollars she earns annually above $2400 (20 C.F.R. 404.432, Pub. L. 93-66, 87 Stat. 153, Section 202(a)).

ing birth to their child (J.S. App. 3a). For the seven years preceding her death, Paula Wiesenfeld had been employed as a school teacher and deductions had been made from her salary at the maximum level established by the Social Security Administration. Throughout their marriage, both Paula and Stephen Wiesenfeld were employed (although he was pursuing an education during this period), but Paula Wiesenfeld's earnings exceeded those of her husband. For the two and one-half years of their marriage, Paula Wiesenfeld's annual earnings were approximately $10,000, while Stephen Wiesenfeld earned approximately $3,000 a year. Subsequent to his wife's death, however, Stephen Wiesenfeld, who holds three university degrees, was employed as a technical consultant by an engineering firm at a salary of $18,000 a year. He was dismissed from that position after seven months, and was unemployed at the time of the decision of the court below (J.S. App. 3a-4a).

In June 1972, after his wife's death, Stephen Wiesenfeld applied for widow's insurance benefits at the New Brunswick, New Jersey, Social Security office. He obtained child's insurance benefits for his son,[2] but was advised that he was not entitled to "mother's benefits," as they are termed in the Act, because 42 U.S.C. 402(g) provides such benefits only for women (J.S. App. 4a). In February 1973, he commenced this action in the district court against

[2] 42 U.S.C. 402(d) provides child's insurance benefits equal to three-fourths of the primary insurance amount of the deceased parent.

the Secretary of Health, Education and Welfare, contending that Section 402(g), insofar as it affords benefits solely to women, invidiously discriminates on the basis of gender, in violation of the Due Process Clause of the Fifth Amendment to the Constitution.

A three-judge court, convened pursuant to 28 U.S.C. 2282, declared Section 402(g) unconstitutional as written, and required that payments be made to widowers with children in their care, as well. The court first held that the statutory classification limiting benefits to widows provided equal protection under the traditional "reasonable basis" test of the Fifth Amendment (J.S. App. 18a). In so holding, the court observed that "women have been and continue to be unable to earn incomes comparable to those of men," and that the statute is, therefore, reasonably designed to rectify the effects of past and present discrimination against women (J.S. App. 17a). The court, however, further held that statutory classifications based upon sex were "inherently suspect," and could thus be sustained only if supported by a "compelling governmental interest" (J.S. App. 19a-20a). The court intimated that action favoring a formerly disfavored class such as women would serve such a compelling interest, but found that the challenged provision, while designed to relieve the effects of economic discrimination against women, actually "discriminates against some of the group which it is designed to protect" (J.S. App. 20a). This is so, the court reasoned, because the statute allegedly renders a female wage-earner's social security insurance

of lesser value than that of a male wage-earner, since her surviving spouse is not entitled to this benefit received by the surviving spouse of a male wage-earner. Accordingly, the court declared 42 U.S.C. 402 (g) unconstitutional, and enjoined the Secretary from denying benefits under the statute to otherwise qualified widowers. This Court, on October 15, 1974, noted probable jurisdiction of the Secretary's appeal.

SUMMARY OF ARGUMENT

1. The legislation challenged here must be upheld if the classification created has a rational basis in that it bears a fair relation to a legitimate object of legislation. *Geduldig* v. *Aiello*, No. 73-640, decided June 17, 1974, slip op. 10; *Dandridge* v. *Williams*, 397 U.S. 471, 485; *Richardson* v. *Belcher*, 404 U.S. 78, 84. This is true both because we deal here with the benefits conferred by a social welfare program and because classifications based on sex have been judged by that standard, whether designed specifically to favor women or not. *Flemming* v. *Nestor*, 363 U.S. 603, 611; *Kahn* v. *Shevin*, 416 U.S. 351, 356, n. 10; *Geduldig* v. *Aiello*, *supra*.

2. This legislation does have a rational basis. It is designed to confer greater benefits on widows than on widowers, in recognition of the substantially greater difficulties females, and especially widows, face in supporting themselves in the labor market. *Kahn* v. *Shevin*, *supra*, 416 U.S. at 356. This difficulty is even greater when the widow has a child in her care.

3. There also exists here a compelling state interest supporting the classification. As the court below (and even two of the dissenters in *Kahn*, *supra*, 416 U.S. at 359) noted, the state does have a compelling interest in rectifying the effects of past and present discrimination. Contrary to the district court's holding, the statute does not discriminate against female wage-earners such as Paula Wiesenfeld. A wage-earner has no particular interest in the allocation of benefits among potential recipients. *Flemming* v. *Nestor*, *supra*, 363 U.S. at 609-610. Moreover, female wage-earners receive a far greater share of social security benefits paid to them and paid on their accounts than the share of total Social Security taxes they pay. Finally, any case in which greater benefits are paid to women based on a marital relation could be cast in the form of a discrimination against the women whose spouses do not receive similar benefits. But it would be illogical to take that view where, as in Social Security, there is no necessary connection between payments and benefits, and where the benefit is in no sense a part of compensation, as was the case in *Frontiero* v. *Richardson*, 411 U.S. 677, 679, 691 n. 25.

ARGUMENT

I

THE LEGISLATIVE DECISION TO GRANT BENEFITS TO WIDOWS CARING FOR CHILDREN AND TO DENY BENEFITS TO WIDOWERS DOES NOT DENY EQUAL PROTECTION IF THE CLASSIFICATION HAS A RATIONAL BASIS

Under the traditional equal protection analysis, "a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." *Frontiero* v. *Richardson*, *supra*, 411 U.S. at 683; see also *Bolling* v. *Sharpe*, 347 U.S. 497, 499; *Schneider* v. *Rusk*, 377 U.S. 163, 168; *Shapiro* v. *Thompson*, 394 U.S. 618, 642. When, as here, we deal with statutes "[i]n the area of economics and social welfare," a legislative classification must be sustained "if any state of facts reasonably may be conceived to justify it." *Dandridge* v. *Williams*, 397 U.S. 471, 485; see also *Richardson* v. *Belcher*, 404 U.S. 78, 81, 84; *Jefferson* v. *Hackney*, 406 U.S. 535, 546; *McGowan* v. *Maryland*, 366 U.S. 420, 426.

A majority of this Court has never held that any criterion other than the "rational basis" standard is to be applied in cases dealing with distinctions based on gender. See *Frontiero* v. *Richardson*, 411 U.S. 677, 682 (opinion of four justices). Indeed, several recent cases concerning sexual distinctions specifically reaffirmed the rational basis standard. In *Geduldig* v. *Aiello*, No. 73-640, decided June 17, 1974, this Court upheld a state disability insurance scheme that

excluded from its coverage the loss of earnings caused to women by normal childbirth. Citing *Dandridge*, *Jefferson*, and *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, all cases upholding the "traditional" test, the Court stated (slip op. at 10):

> * * * Particularly with respect to social welfare programs, so long as the line drawn * * * is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point.

In *Kahn* v. *Shevin*, 416 U.S. 351, the Court upheld a tax benefit given to widows, but not to widowers, because it "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation" (*id.* at 355). The Court noted specifically that "[g]ender has never been rejected as an impermissible classification in all instances," citing cases relying on the rational basis standard (*id.* at 356 n. 10). See also *Reed* v. *Reed*, 404 U.S. 71, 76.

Indeed, by sustaining the statute in *Kahn* solely on the ground that it satisfies the traditional reasonable basis test, the Court has strongly indicated that classifications based upon gender are not subject to the strict, compelling interest, standard of review. Gender classifications do not constitute a "suspect" category warranting strict judicial scrutiny. Although sex, like race and national origin, is a biological characteristic, generally visible and immutable, and to that extent shares the attributes of those suspect categories, the analogy terminates at this point.

For differences based upon gender, as the present case illustrates, are too often the subject of legitimate governmental legislation to warrant characterization as a "suspect" category. This Court, and the courts of appeals, have recently sustained a variety of statutes distinguishing on the basis of gender, and touching on quite varied areas of life.[a]

We submit, therefore, that gender-based classifications are not to be evaluated under the compelling in-

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[a] *Kahn* v. *Shevin*, *supra* (property taxes); *Williams* v. *McNair*, 401 U.S. 951, affirming 316 F. Supp. 134 (D. S.C.) (separate college branches for men and women); *Gruenwald* v. *Gardner*, *supra*, 390 F.2d 591 (C.A. 2), certiorari denied *sub nom. Gruenwald* v. *Cohen*, 393 U.S. 982 (social security benefits); *Kohr* v. *Weinberger*, 378 F. Supp. 1299 (E.D. Pa.) (same); *Robinson* v. *Board of Regents of Eastern Kentucky Univ.*, 475 F. 2d 707 (C.A. 6), certiorari denied, 416 U.S. 982 (college curfew requirements); *Miskunas* v. *Union Carbide Corp.*, 399 F. 2d 847 (C.A. 7), certiorari denied, 393 U.S. 1066 (consortium cause of action limited to men); *Lily* v. *Lily* (Sup. Ct. Va.), October 23, 1973, appeal dismissed for want of a substantial federal question, 416 U.S. 976 (alimony and lawyer's fees in divorce awardable only to wife); *Stuart* v. *Stuart*, (Cal. Ct. App.), September 26, 1973, appeal dismissed for want of a substantial federal question, 416 U.S. 976 (preference to women in custody of young children after divorce). At the same time, several statutes have been determined to be unreasonable and have been held unconstitutional. *Frontiero* v. *Richardson*, *supra*; *Reed* v. *Reed*, *supra*; *Eslinger* v. *Thomas*, 476 F. 2d 225 (C.A. 4) (invalidating State resolution barring females from serving as Senate pages); *Brenden* v. *Independent School District 742*, 477 F. 2d 1292 (C.A. 8) (invalidating State rule preventing girls from participating in high school noncontact sports with boys); *Healy* v. *Edwards*, 363 F. Supp. 1110 (E.D. La.), probable jurisdiction noted, 415 U.S. 911, argued October 16, 1974 (invalidating State statute exempting from jury service women who do not voluntarily register for it).

terest test. Where sex differences are manifestly irrelevant to the particular objective sought to be attained by the legislature, this Court struck down the statute. See, *e.g.*, *Stanley* v. *Illinois*, 405 U.S. 645 (fathers, but not mothers, of illegitimate children denied a hearing before children removed for unfitness); *Reed* v. *Reed*, 404 U.S. 71 (men always preferred to women as executors). On the other hand, where those differences do pertain to the legislative objective, the reasonable basis test has been applied because it permits the implementation of legitimate social and economic policies (*Kahn* v. *Shevin*, *supra*; *Williams* v. *McNair*, *supra*).

II

THE CHALLENGED CLASSIFICATION HAS A RATIONAL BASIS AND IS REASONABLY RELATED TO A PROPER LEGISLATIVE OBJECTIVE

Under the rational basis test, the challenged statute is constitutional. As the court below recognized, Section 402(g) "is a rational attempt by Congress to protect women and families who have lost the male head of the household" (J.S. App. 18a). The statutory limitation of benefits to women is "not arbitrary because it is very evident that women have been and continue to be unable to earn income equal to that of men even though Congress has clearly indicated that job discrimination on the basis of sex shall be unlawful" (*ibid.*). The challenged classification, therefore, serves the legitimate, compassionate governmental objective of ameliorating the harsh economic

circumstances of women with families who have been deprived of the support of a husband.[4]

The legislative history of the Social Security Act, while not entirely clear with respect to the objective of Section 402(g), reflects the longstanding concern of Congress with the plight of beneficiaries, such as widows, who survive the insured worker.[5] The original Social Security Act of 1935 provided no benefits to the families of deceased insured workers, except a lump sum death benefit to the estate of the insured (49 Stat. 623, Sec. 203(a)).

In 1939, however, Congress substantially expanded the statute to establish monthly benefits for certain classes of survivors who could generally be presumed to be dependent on the insured worker. Social Security Act Amendments of 1939, H. Rep. No. 728, 76th Cong., 1st Sess., p. 11. In determining the classes of eligible beneficiaries, Congress acted upon the premise that "[u]nder a social-insurance plan the primary purpose is to pay benefits *in accordance with the*

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[4] This Court's opinion in *Kahn* v. *Shevin*, *supra*, 416 U.S. at 353-354 and nn. 4-7, amply documents the unfortunate economic situation confronting women who seek employment, and we therefore do not reiterate those findings here. See n.9, *infra*.

[5] Of course, when determining the constitutionality of legislation under the traditional equal protection test, a statute will be sustained if a legitimate governmental objective can be conceived. *Dandridge* v. *Williams*, *supra*, 397 U.S. at 485; *McGowan* v. *Maryland*, *supra*, 366 U.S. at 426. Since the governmental interest posited by the district court clearly is a legitimate one, no further demonstration of legislative intent is required to uphold it.

probable needs of the beneficiaries * * *" (*id.* at 7; emphasis added). In accordance with that criterion, Congress concluded that the "probable need" was greatest in the case of aged widows, orphans, dependent parents over 65, and widows with minor children (*id.* at 11), and enacted, *inter alia*, Section 202(e) of the Social Security Act, 53 Stat. 1365, the predecessor of the existing widow's benefits provision.[6] The provision for benefits for widows with families has been substantially retained in subsequent revisions of the Act since 1939.[7] Congress has consistently rejected, however, numerous attempts to provide analogous benefits to men. At least twelve bills were introduced in the last seven years alone which would have extended benefits to surviving fathers with young children. On each occasion, the proposed legislation failed to pass.[8] This consistent

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[6] In 1950, the title of this provision was changed from "widow's insurance benefits" to "mother's insurance benefits," to reflect more accurately that benefits are payable only to widows with children in their care. S. Rep. No. 1669, 81st Cong., 2d Sess., p. 65.

[7] The coverage of the statute has gradually been enlarged to include, *e.g.*, benefits to the divorced wife of a deceased insured who was dependent upon the latter (Pub. L. 81-734, Section 101(a), 64 Stat. 485), and later to eliminate the dependency requirement for surviving divorced wives (Pub. L. 92-603, Section 114(c) 86 Stat. 1348).

[8] 90th Congress, H.R. 9715, 1st Sess.; 91st Congress, H.R. 250, H.R. 841, H.R. 14277, 1st Sess.; 92d Congress, H.R. 3289, H.R. 7537, 1st Sess., H.R. 15528, H.R. 16036, H.R. 16101, 2d Sess.; 93d Congress, H.R. 1570, H.R. 5670, H.R. 10499, 1st Sess.

pattern of legislation reflects the considered judgment of Congress that the "probable need" for financial assistance is greater in the case of a widow, with young children to maintain, than in the case of similarly situated males.[9] For this reason, Congress has provided benefits to this class of survivors, as it has to other groups such as dependent parents over 65 and aged widows, who cannot fairly be expected to replace, by their own efforts in the job market, the loss of support occasioned by the death of a family wage-earner.

Since Section 402(g) is reasonably designed to offset the adverse economic situation of women by providing a widow with financial assistance to supplement or substitute for her own efforts in the marketplace, the challenged classification is valid because it has a reasonable basis. Indeed, this Court, in *Kahn* v. *Shevin*, *supra*, recently confirmed the constitutionality of legislation designed to ameliorate the inferior economic status of women. There, the Court upheld a

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[9] The gross disparity noted above (n. 4, *supra*) also exists in one-parent families. In 1972, the median income of female heads of household who were employed full-time the year around was $6,508, while for male household heads with no wife present, it was $9,917. This probably understates the earnings disparity, as females would be far more likely to have non-earnings income such as welfare, pensions, annuities or Social Security benefits. In addition, only 33% of the female heads of household were thus fully employed, as opposed to 56% of the comparably situated males. *Money Income in 1972 of Families and Persons in the United States*, Bureau of the Census, Current Population Reports, Series P-60, No. 90, Table 46 (1973).

Florida statute providing a property tax exemption only for widows against an equal protection challenge by a widower who contended that the statutory restriction of benefits to women invidiously discriminated on the basis of sex. The Court upheld the classification because it was reasonably designed to reduce the "disparity between the economic capabilities of a man and a woman" (416 U.S. at 352). In so holding, the Court noted that financial assistance limited to women is constitutionally permissible in appropriate cases, because (*id.* at 353):

> whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs. [*id.* at 353]

These observations are equally apposite here, where the challenged statute is premised upon the same economic factors considered relevant in *Kahn*, and is intended to fulfill the same purpose.[10] Since the stat-

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[10] The Court of Appeals for the Second Circuit, in *Gruenwald* v. *Gardner*, 390 F. 2d 591, certiorari denied *sub nom. Gruenwald* v. *Cohen*, 393 U.S. 932, sustained on this very ground the constitutional validity of 42 U.S.C. 415(b), which afforded favored treatment to women wage-earners in computing social security benefits based on their earnings records. The court held that the statute was rationally based, and free of invidious discrimination, notwithstanding that the classification was expressly based upon gender. In upholding the statute, the court stated (390 F. 2d at 592):

> There is here a reasonable relationship between the objective sought by the classification, which is to reduce the disparity between the economic and physical capabilities of a man and a woman—and the means used to achieve

ute upheld in *Kahn* had precisely the same object and effect as Section 402(g), that decision is controlling here. For in this case, as in *Kahn*, the statutory classification limiting benefits to widows alone is fully justified because the economic difficulties "confronting the lone woman * * * exceed those facing the man," and that "[t]he disparity is likely to be exacerbated for the widow" (416 U.S. at 354).

Indeed, this statute lacks the features of overinclusion which caused two justices to dissent from the Court's holding in *Kahn*. See 416 U.S. at 360. For unlike the Florida property tax exemption sustained in *Kahn*, which afforded benefits to all widows, Section 402(g) is more precisely drafted to further restrict the class of eligible beneficiaries to widows *with children in their care*. One may easily conclude that the severe employment difficulties which confront a widow are further compounded if she is also responsible for the care of minor children (see n. 9, *supra*). In such a case, the Constitution does not forbid Congress from legislating to ameliorate, in some degree, the harsh financial condition of only this limited class of citizens. See *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489.[11]

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that objective in affording to women more favorable benefit computations.

See also *Kohr* v. *Weinberger*, 378 F. Supp. 1299 (E.D. Pa.).

[11] As noted above (n. 1), benefits are further reduced by one-half of earnings in excess of $2400 per year. Accordingly, unlike the statute involved in *Kahn*, Section 402(g) further relates the receipt of benefits to actual need. We also

Appellee has contended that this statute denies equal protection no less than the statute in *Frontiero*, *supra*, because in each case the spouse of a female was denied some benefit that might be available to the spouse of a male (Mot. Aff. 4). This analysis ignores the fact that in *Frontiero*, the challenged requirement explicitly diminished the compensation available to female officers as compared to male officers. It is for just this reason that similar distinctions in benefits have been forbidden under the Equal Pay Act of 1963, 29 U.S.C. 206(d) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2. Social Security benefits, on the other hand, are not compensation. They are allocated to a significant extent in relation to probable need. And, as we show in

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note that the point at which benefits would cease in this case, should benefits be paid, is $8360 ($2980 in annual benefits x 2 + the initial $2400), which is between the median earnings for men and women. See n. 9, *supra*; *Kahn*, *supra*, 416 U.S. at 353, nn. 4 and 5. Thus, the bulk of male workers would receive no benefits in any event, because of their earnings, while the bulk of female workers would require such benefits despite their labors.

Of course, while Congress could also have afforded benefits to men, and applied the earnings deductions to them as well, there is no constitutional requirement that Congress adopt this course. For this Court does not sit "to second-guess * * * officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge* v. *Williams*, 397 U.S. 471, 487. "So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket." *Jefferson* v. *Hackney*, *supra*, 406 U.S. at 546.

greater detail below, at pp. 19-20, any measure favorable to females based in part on a past marital relation (*e.g.*, the tax exemption in *Kahn*) could be cast in the form of a discrimination against females whose spouses cannot obtain similar benefits. This strained analysis should not obscure the overwhelmingly favorable effect on women of the challenged requirement.

III

THE CHALLENGED STATUTE SERVES A COMPELLING GOVERNMENT INTEREST AND DOES NOT DISCRIMINATE AGAINST FEMALE WAGE-EARNERS

The district court, contrary to our submission in Point I, *supra*, found that sex was a "suspect" category and that the statute must serve a "compelling" government interest to survive. It stated, however, that such an interest might be found in measures designed to remedy past discrimination, even when involving that most "suspect" of classes, race (J.S. App. 20a). It held, however, that this statute did not so operate, because it discriminated against a woman wage-earner because her beneficiaries "receive less social security benefits than those of a male" similarly situated (*ibid.*). We now show that the lower court was correct in holding that a statute benefiting females served a compelling state interest, but erred in determining that the statute should be overturned for discriminating against female wage-earners.

There is general agreement that a program providing favorable treatment to certain groups to rectify past discrimination may serve a compelling state interest. See J.S. App. 20a, n. 29 and cases there cited concerning employment programs favoring minority groups. Mot. Aff. 8. In those cases where some members of this Court have indicated that a compelling interest standard should be applied to gender classifications, they have also indicated that classifications favorable to females meet that standard. In *Frontiero, supra*, 411 U.S. at 689 n. 22, the four justices supporting the compelling interest standard specifically noted that the statute there challenged was not "in any sense designed to rectify the effects of past discrimination against women," citing *Gruenwald* v. *Gardner, supra* n. 3. *Gruenwald* upheld another portion of the Social Security Act according women favored treatment in benefit computation.

Even two of the three dissenters in *Kahn* (Justices Brennan and Marshall) agreed that a statute giving disproportionate benefits to females served a compelling interest. They stated: "the statute serves a compelling governmental interest by 'cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden,'" which is exactly the purpose and effect of the statute here. 416 U.S. at 358.[12] We therefore

[12] Those justices nevertheless dissented because the statute was not drawn narrowly enough to exclude benefits to affluent widows. The provisions regarding earnings set forth

submit that the challenged statute does not unconstitutionally discriminate against men by providing greater benefits to women.

Nor is the interest less compelling because of its alleged discrimination against women wage-earners (Mot. Aff. 4-5, 8). Appellee's argument that this statute so discriminates is no sounder than an argument that in *Kahn* v. *Shevin*, a female Florida taxpayer is getting less for her taxes because she knows that if she dies her widower will not receive a tax exemption, while a similarly situated male would have the comfort of knowing that his widow would be so aided. We submit that such an analysis was not accepted there, and is equally unconvincing here for several reasons.

The district court was incorrect in focusing on the wage-earner, whose entitlement to benefits on her own account is not in issue. Rather, we deal here with the allocation of public benefits among surviving beneficiaries in accordance with their probable need —a function in which Congress necessarily has the broadest possible latitude. *Richardson* v. *Belcher*, *supra*; *Jefferson* v. *Hackney*, *supra*. The plenary authority of Congress to allocate benefits without regard to what might be the wage-earner's wishes is further supported by the fact that "[e]ach worker's

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supra, nn. 1, 11, almost entirely meet this objection in the instant case. Although a widow with wealth from sources other than earnings would still receive payments, this focus only on earnings rather than total income pervades the entire Act.

benefits * * * are not dependent on the degree to which he was called upon to support the system by taxation." *Flemming* v. *Nestor*, 363 U.S. 603, 609-610. Far from being a private insurance program, in which benefits are correlated with contributions (*ibid.*):

> The Social Security system may be accurately described as a form of social insurance, enacted pursuant to Congress' power to "spend money in aid of the 'general welfare,'" * * * whereby persons gainfully employed, and those who employ them, are taxed to permit the payment of benefits to the retired and disabled, and their dependents. * * * It is apparent that the noncontractual interest of an employee covered by the Act cannot be soundly analogized to that of the holder of an annuity, whose right to benefits is bottomed on his contractual premium payments.

Accordingly, since the amount of benefits on account of a wage-earner, male or female, are determined, not solely by the wage-earner's contributions, but by the legislative judgment of Congress regarding the probable economic needs of the beneficiaries, the wage-earner cannot legitimately complain when Congress employs those criteria in allocating benefits.

Moreover, the Social Security system as a whole provides proportionately greater benefits to women than to men. See *Geduldig* v. *Aiello*, *supra*, slip op. at 11 and n. 21. We are informed by the Office of the Chief Actuary, Social Security Administration, that 28% of all Social Security taxes are

presently paid on account of female workers. However, 34% of all benefit payments are made based on the accounts of female workers; 44% of all payments made directly to workers (as opposed to dependents or relatives) are made to females; and 51% of all social security payments are made to females. Under appellee's theory, presumably these figures would all be evidence of discrimination against male workers, as their contributions bring them and their dependents proportionately smaller benefits. We submit that the situation cannot be so viewed. Where a payment is made as a social welfare measure to the recipient, rather than as an item of compensation to a spouse (as in *Frontiero*), it is proper to consider the payment as it affects the recipient, rather than the conjectural effect on the non-recipient spouse.

As an illustration, consider the effect of "rectifying" this alleged discrimination against women by extending the instant "mother's benefits" to fathers. An affidavit below indicated that the cost of this measure would be approximately $20 million (and over $300 million if other very closely analogous provisions were extended) (R. 13). As the system is required to remain in actuarial balance, this money must be financed either by a rise in taxes or a decrease in benefits. It is very difficult to fathom how an increased benefit paid exclusively to males, yet financed either out of taxes, 28% of which are paid by females, or benefits, 34-54% of which are paid to females or on the accounts of females, can be an elimi-

nation of anti-female discrimination. Yet that is the import of the district court's analysis.

We submit that even under the compelling interest standard, the challenged benefit is exactly the type of measure designed to rectify economic inequalities permitted by that standard. See *Frontiero*, *supra*, 411 U.S. at 689, n. 22; *Kahn* v. *Shevin*, *supra*, 416 U.S. at 358-360 (Marshall and Brennan, JJ., dissenting).

CONCLUSION

It is therefore respectfully submitted that the judgment of the district court should be reversed.

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NOVEMBER 1974.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1974 564279 76